No. 75-1494

In the Supreme Court of the United States

OCTOBER TERM, 1976

SAUL G. SCHENKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

WILLIAM G. OTIS,
JOHN J. KLEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1494

SAUL G. SCHENKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 529 F. 2d 96.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1976, and a petition for rehearing with a suggestion for rehearing *en banc* (Pet. App. B) was denied on March 17, 1976. The petition for a writ of certiorari was filed on April 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the sale of lots with respect to which no statement of record has been filed and no printed property report has been furnished to the purchaser constitutes a crime under the Interstate Land Sales Full Disclosure Act, or whether the Act makes such conduct criminal only when the seller also commits fraud in the sale.

STATUTE INVOLVED

Section 1404 of the Interstate Land Sales Full Disclosure Act, 82 Stat. 591-592, 15 U.S.C. 1703, provides, in pertinent part:

> (a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—
>
> (1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1706 of this title and a printed property report, meeting the requirements of section 1707 of this title, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser; and
>
> (2) in selling or leasing, or offering to sell or lease, any lot in a subdivision—
>
> (A) to employ any device, scheme, or artifice to defraud, or
>
> (B) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report or with respect to any other information pertinent to the lot or the subdivision and upon which the purchaser relies, or
>
> (C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

* * * * *

STATEMENT

Petitioner pleaded guilty to one count of an indictment returned in the United States District Court for the District of Arizona charging that, in violation of Section 1404 of the Interstate Lands Sales Full Disclosure Act, 15 U.S.C. 1703, he had used interstate commerce and the mails to sell a lot with respect to which a statement of record had not been filed with the Secretary of Housing and Urban Development and a printed property report had not been furnished to the purchaser, as the Act requires (Pet. App. A-2, A-3). He was sentenced to three years' imprisonment and a $5,000 fine (Pet. 3). He sought post-conviction relief, which the district court treated as an application under 28 U.S.C. 2255, on the ground that the count to which he had pleaded guilty did not state an offense (Pet. 3; Pet. App. A-2). The district court held that the count charged an offense, and the court of appeals affirmed (Pet. App. A-2).

ARGUMENT

The Interstate Land Sales Full Disclosure Act "is designed to prevent false and deceptive practices in the sale of unimproved tracts of land by requiring developers to disclose information needed by potential buyers" (*Flint Ridge Development Co.* v. *Scenic Rivers Association of Oklahoma,* No. 75-510, decided June 24, 1976, slip op. 1). Section 1404(a) of the Act, 15 U.S.C. 1703(a), makes it unlawful for the developer of a commercial subdivision to use interstate commerce or the mails "(1) to sell or lease any lot in any subdivision unless a statement of record [containing specified information relating to the land] with respect to such lot is in effect" and a "printed property report," which summarizes the statement of record, is furnished to the purchaser prior to the signing of any contract of sale or lease "and (2) in selling or leasing, or offering to sell or lease, any lot in a subdivision," to engage in any fraudulent practice.

The count of the indictment to which petitioner pleaded guilty charged that he had violated subparagraph (1) by using interstate commerce and the mails to transfer a contract of sale for a lot with respect to which no statement of record was in effect and no printed property report had been furnished. Petitioner argues that the count did not charge a violation of the Act because the statute makes criminal only conduct that violates both subsections (1) and (2). This is so, he contends, because the two subsections are connected by the conjunctive "and" rather than the disjunctive "or".

The court of appeals correctly rejected the claim in a ruling of first impression, and there is no occasion for further review.

The Act makes criminal two different types of conduct: (1) the selling or leasing of lots with respect to which the requisite information has not been filed with the Secretary or furnished to the purchaser, and (2) the use of any fraudulent scheme in such selling. The presence of the word "and" to connect these two categories of offenses does not indicate that the only conduct made criminal is that involving both elements. To the contrary, it shows only that Congress intended to make both acts a crime. Petitioner's interpretation of the statute would defeat the congressional purpose of protecting purchasers of land from deception, since under his view even the most flagrant frauds committed in the sale of lots would not be a crime as long as the seller had filed a proper statement of record and had furnished the purchaser with a proper printed property report.

The legislative history of the Act confirms that Congress intended to make the two types of conduct described in subsections (1) and (2) of Section 1404(a) separate crimes. In introducing the land sales bill, its sponsor, Senator Williams of New Jersey, stated that the statute had two

complementary goals: to require disclosure of material information prior to sale and to prohibit fraudulent sales techniques. He noted (113 Cong. Rec. 316 (1967)) that

> [i]t would be illegal to sell the land unless the registration statement was in effect. * * *
>
> * * * * *
>
> *In addition,* this bill would make it unlawful to sell lots in a subdivision by the use of fraudulent devices or practices, or by using misstatement of facts or misleading facts. [Emphasis added.]

Senator Mondale, co-sponsor of the bill, made the same point (*id.* at 317):

> Fraud statutes meet a fundamental problem here of the person who affirmatively misrepresents a fact, who openly lies about something that is false. The fraud statutes will help reach that problem, but we are trying to get at a different objective here, one in addition to fraud. That is the affirmative responsibility on one who sells real estate in interstate commerce * * * to affirmatively tell all of the facts, the bad as well as the good, and it is a different principle that we are trying to achieve in this measure that has to be clearly understood.

See also 114 Cong. Rec. 14957, 15270 (1968).

The legislative history shows that Congress recognized that after-the-fact prosecutions of fraudulent promoters would not enable the defrauded investors to recoup their losses. By requiring developers to provide full disclosure to prospective purchasers in advance of sale, Congress intended to provide a separate and more effective remedy to combat such frauds. 113 Cong. Rec. 317-318 (1967). As the court of appeals pointed out (Pet. App. A-4), under

petitioner's interpretation of Section 1404(a), the government would be required to prove more in order to obtain a conviction under that statute than was required under traditional anti-fraud provisions:

> This would lead to the illogical result that a statute aimed at expanding control over the land sales industry actually imposed a higher standard on the prosecution than was demanded under the very legislation the new act was intended to supplement.

The Land Sales Act "is based on the full disclosure provisions and philsophy of the Securities Act of 1933 * * * which it resembles in many respects" (*Flint Ridge, supra,* slip op. 1-2). The Securities Act in separate sections makes it a crime to sell any non-exempted securities with respect to which a registration statement is not in effect (15 U.S.C. 77e) and to engage in any fraudulent practice in the offer or sale of securities in interstate commerce or through the mails (15 U.S.C. 77q). These two separate prohibitions in the Securities Act concededly create separate crimes.

Congress did not intend to provide a different rule for the parallel provisions in the Land Sales Act merely because it made them subdivisions of a single section of that Act connected with each other by the word "and". In order to effectuate the legislative intent, "courts are often compelled to construe '*or*' as meaning '*and* ', and again '*and* ' as meaning '*or*' " (*United States* v. *Fisk,* 3 Wall. 445, 447; see also, *Kerlin's Lessee* v. *Bull,* 1 Dall. 175, 178; *Peacock* v. *Lubbock Compress Company,* 252 F. 2d 892, 893-894 (C.A. 5), certiorari denied, 356 U.S. 973).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

WILLIAM G. OTIS,
JOHN J. KLEIN,
Attorneys.

JULY 1976.